Supreme Court, U.S.
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NO. 92-1670

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CLIFFORD FERGUSON, Petitioner

v

THE UNION CITY DAILY MESSENGER and
DAVID BARTHOLOMEW, Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE
TENNESSEE SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. CONSTITUTIONAL INTERPRETATION ISSUE

In their Brief In Opposition to Clifford Ferguson's Petition for Writ of Certiorari, the Respondents allege that the Tennessee Supreme Court has "construed Section 19 . . . "as providing greater protection than the First Amendment to the Constitution of the United States." (Respondents' Brief In Opposition, at page 7). Moreover, Respondents also alleged that Section 19 is "broader than the Federal Constitution...," and therefore contend that the decision of the State Supreme Court rests upon an adequate State ground. (Respondents' Brief In Opposition, at page 9). The Respondents are incorrect, since the Tennessee Supreme Court has clearly stated that the protection to the press granted by Article I, Section 19 of the Tennessee Constitution is coextensive with the protection granted by the First Amendment.

There is thus no independent state ground underpinning the result reached by the State Supreme Court, but there is merely its misapplication of this Court's First Amendment authorities.

The only case cited by Respondents allegedly supporting their contentions is Press, Incorporated v. Verran, 569 S.W.2d 435 (Tenn. 1978), wherein the Tennessee Supreme Court was faced with determining whether the plaintiff, a junior social worker, was to be considered a "public figure" or "public official" for purposes of the First Amendment.

At the outset, the Verran Court noted that the Supreme Court of the United States "has constitutionalized the law of libel and, in material particulars, has preempted state statutory and decisional law in cases and controversies involving the communications media." Id. at 440. Keeping this fact in mind, the Verran court examined the Supreme Court decisions which established the

aforementioned libel law, and its relationship to the United States and Tennessee Constitutions. Specifically the court discussed New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), in which the Court established a new rule of "constitutional privilege," which requires a public official suing for damages for a defamatory falsehood to prove that the defamatory statement was made with "actual malice - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280, 84 S. Ct. at 726, 11 L.Ed.2d at 706.

Contrary to the assertions made by the Respondents in their Brief In Opposition, the Tennessee Supreme Court in Verran did not construe Section 19, of Article I of the Tennessee Constitution as providing greater protection than the First Amendment to the Constitution of the United States. The Respondents' selective quotations from the

case fail to accurately state the true holding of the Court in Verran. Essentially, the Court did not construe Section 19 as being broader than the First Amendment, but rather it ruled that the Tennessee provision was "substantially stronger" than the First Amendment "in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification." Id. at 442. Although more detailed and precise than the First Amendment, the Verran Court nonetheless held that Section 19, Article I's "abuse of that liberty" language is to be equated with the "actual malice" standard established by the Supreme Court in New York Times v. Sullivan. The Verran Court therefore held that in Tennessee, "the right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity, or reckless disregard for the

truth." Id. See also; Windsor v. Tennessean, 654 S.W.2d 680, 683-84 (Tenn. Ct. App. 1983).

It is evident from the decision in Verran that the Tennessee Supreme Court was attempting to fashion Tennessee's libel law in a manner which was consistent with the United States Supreme Court decision in New York Times v. Sullivan. It follows that the "actual malice" standard will govern any "public figure" defamation action, regardless of whether the United States or Tennessee Constitution applies. Respondents' contention that the Tennessee Constitution provides more protection than the First Amendment is therefore without merit.

II. ACTUAL MALICE ISSUE

Another issue first raised by the Respondents in their Brief in Opposition is the assertion that the lower court's failure to find common law malice similarly precluded a finding of New York Times "actual malice." The Respondents contend that "(i)n the absence

of malice, there could not be 'actual malice'as required by New York Times Co. v. Sullivan." (Respondents' Brief in Opposition, at page 10). Since common law malice was not proven in the lower courts, allege the Respondents, "the State Supreme Court had no reason to discuss actual malice which is much more than common law malice from which this Court departed in New York Times." (Respondents Brief in Opposition, at page 11). Accordingly, Respondents use this faulty reasoning to conclude that "the State Supreme Court had no need to discuss actual malice." (Respondents' Brief in Opposition, at page 11.)

Throughout the evolution of this case, not one court has ever considered whether the Respondents published the defamatory statements with "actual malice." Although Respondents seek to analogize common law malice with "actual malice," they fail to recognize that these two theories are

independent of each other, especially in the context of the case at bar.

Petitioner sued Respondents not only for defamation, but for statutory and common law interference with contract as well. As noted by the Tennessee Court of Appeals, an action for procurement of a breach of contract has seven elements, most notably that "the wrongdoer must have acted maliciously." Campbell v. Matlock, 749 S.W.2d 748, 751 (Tenn. Ct.App. 1988). As correctly stated by Respondents, the Court of Appeals did conclude that "Ferguson failed to show that the defendants acted maliciously." (Tenn. Ct. App. Decision, at page 8). What the Respondents failed to point out to this Court is that the failure to find malice related only to the procurement of breach claim and its requirement of ill will or common law malice, not the defamation claim and its requirement of actual malice. The only action taken by the Court of Appeals concerning the

defamation issue was to remand the case to determine whether Petitioner was even a "public figure," and was therefore required to prove actual malice.

The fact that New York Times actual malice is separate and apart from the typical common law malice needed to prove claims such as procurement of breach is axiomatic to this Court. While one form of malice contemplates "(t)he intent, without just cause or reason, to commit an unlawful act that will result in injury to another," the other form was judicially created by this Court in New York Times. The American Heritage Dictionary, p.759 (2d. ed. 1985). "Actual malice," as used in the defamation - public figure context, involves defamatory statements made "with knowledge that it was false or with reckless disregard of whether it was false or not. " New York Times, 376 U.S. at 279-80.

It is evident that common law malice shares little in common with New York Times

"actual malice." The latter is only applicable in a select and narrow group of cases, while common law malice may be an essential element of any number of causes of action. The only form of malice ever found to be lacking in this case was common law malice, not "actual malice." Because the Court of Appeals remanded the case to determine whether the "actual malice" standard should even apply, it follows that no court has ever applied the "actual malice" standard to the instant case. Although the Tennessee Supreme Court did find that petitioner was a public figure and subject to the "actual malice" test, it nonetheless failed to apply this test. Rather, it simply relied on the findings of the lower Court and summarily concluded that since the defamation was not made with common law malice, it could not be made with "actual malice." As seen from the argument above, this reasoning is both faulty and inconsistent with the standards

established in New York Times. For these reasons, the Petitioner respectfully requests that his Petition be granted.

Respectfully Submitted,

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